

1 Keith A. Fink, Bar No. 146841
2 Sarah E. Hernandez, Bar No. 206305
3 Jennifer H. Yeung, Bar No. 280819
4 KEITH A. FINK & ASSOCIATES
5 11500 West Olympic Boulevard, Suite 316
6 Los Angeles, California 90064
(310) 268-0780 phone
(310) 268-0790 facsimile

7 Attorneys for Respondent
8 Dov Charney

9
10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**

12 NATIONAL LABOR
13 RELATIONS BOARD,
14
15 v. Applicant,
16
17 DOV CHARNEY,
18 Respondent.

) CASE NO. 2:16-mc-00016 JAK(KKx)
) **OPPOSITION TO APPLICATION**
) **FOR ORDER REQUIRING**
) **COMPLIANCE WITH AMERICAN**
) **APPAREL'S ADMINISTRATIVE**
) **SUBPOENA *DUCES TECUM***
) [Compendium of Authorities Filed
) Concurrently Herewith]
) [No hearing date scheduled]
) District Judge: John A. Kronstadt
) Magistrate Judge: Kenly Kiya Kato

23
24 TO THE HONORABLE COURT, ALL PARTIES, AND THEIR RESPECTIVE
25 COUNSEL OF RECORD:

26 Respondent Dov Charney ("Charney" and/or "Respondent"), pursuant to Federal
27 Rules of Civil Procedure 26(c)(7) and 81(a)(5), respectfully submits this Opposition and
28 related documents to the National Labor Relations Board's ("NLRB" or "the Board")

1 Application for Order Requiring Compliance with American Apparel's Administrative
 2 Subpoena *duces tecum* (hereinafter "Application").

3

4 **I. INTRODUCTION**

5 This case presents an unusual situation in that the NLRB seeks to have this Court
 6 not only enforce an impermissibly invasive subpoena *duces tecum*, but also compel Charney
 7 to testify about matters far beyond the realm of permissible inquiry. The NLRB's
 8 Application amounts to an abhorrent abuse of a subpoena initially intended to serve as an
 9 ordinary request for documents (albeit ones that have no bearing on the underlying election
 10 petition).¹ The NLRB has since expanded its scope of inquiry, and now seeks this Court to
 11 not only force Charney to testify about the documents referenced in the subpoena but also
 12 offer testimony about anything remotely related to American Apparel. As a mere third
 13 party to the case, there is simply no justifiable way for Charney to bear this burden.

14 There are numerous defects – and vast overbreadth – in the NLRB's Application.
 15 There also exist several concerns about the Board's investigative subpoena process.
 16 Perhaps most importantly, the pivotal problem with this Application is the NLRB's
 17 insistence on requiring Charney to provide information that is prejudicial, unduly
 18 burdensome, and harassing in nature. Also at issue in this dispute is the NLRB's
 19 unwillingness to ensure that Charney's personal and private information will remain
 20 confidential.

21

22 **II. STATEMENT OF PERTINENT FACTS**

23 On or around November 12, 2015, the General Brotherhood of Workers of American
 24 Apparel (the "Union") filed an election petition against American Apparel, Inc.
 25 ("American Apparel" and/or the "Charging Party"). On or around November 18, 2015,
 26

27 ¹ The NLRB has proffered hand-selected excerpts of hearings as evidence in support of its Application. Only portions of the
 28 record were provided to this Court via their Application. The Court does not have the full record of hearings necessary to
 make a determination as to the necessity or equity of enforcing compliance with American Apparel's administrative
 subpoena *duces tecum*.

1 the Charging Party served a subpoena *duces tecum* B-1-P6SO5T on Respondent seeking
 2 production of eight (8) sets of documents by November 23, 2015.

3 On or around November 20, 2015, Respondent petitioned to revoke the subpoena
 4 pursuant to 29 C.F.R. § 102.31 on the grounds that neither he nor his counsel were available
 5 on the hearing date noticed and that none of the requests relate to any matter under
 6 investigation or in question in the proceeding. His petition further alleged that none of the
 7 Charging Party's requests were described with sufficient particularity and that each of
 8 them was improper for numerous reasons – contentions that Respondent maintains to this
 9 day.

10 During an NLRB hearing on November 30, 2015, Hearing Officer Laura Haddad
 11 ("Officer Haddad") declined to enforce the subpoena on the grounds that there was
 12 contradictory evidence regarding Charney's involvement in the election activity and that it
 13 was "undisputed" that Charney is close friends with several of the individuals whom the
 14 Charging Party sought communications from (hence infringing on Charney's privacy).
 15 November 30, 2015 Hearing Transcript 450:3-13 (Dkt. Page ID: #39). Officer Haddad
 16 acknowledged that the NLRB already had a "huge amount of information on the record"
 17 regarding the matter, thereby diminishing the value of the subpoena. November 30, 2015
 18 Hearing Transcript 451:4-7 (Dkt. Page ID: #40). Officer Haddad further declined to
 19 enforce the subpoena on the grounds that the "information requested is not necessary for
 20 the finder of fact" to reach a decision regarding the underlying matter. November 30, 2015
 21 Hearing Transcript 451:23-25 (Dkt. Page ID: #40). Throughout the hearing, Officer
 22 Haddad repeatedly characterized the subpoena as a request for Charney's documents,
 23 never once mentioning the necessity for Charney's testimony. *See, e.g.*, November 30, 2015
 24 Hearing Transcript 451:22-23; 452:13-15 (Dkt. Page IDs: #40-1).

25 On January 11, 2016, at a follow-up hearing on the matter, Officer Haddad stated –
 26 in stark contrast to her prior position – that the subpoena was not too broad "given the fact
 27 that since June 14 [2014], though Mr. Charney was CEO, he was CEO in name only."
 28 January 11, 2016 Hearing Transcript 505:20-23 (Dkt. Page ID: #48). In response to the

1 concern that many emails between Nativo Lopez and Charney about American Apparel
 2 exist yet are not responsive to the subpoena's request, Officer Haddad stated that "the
 3 Region does not see a way of limiting [the request] and can't at this time contemplate emails
 4 or and communication relating to American Apparel that doesn't somehow indicate
 5 whether or not Mr. Charney is improperly involved with the Petitioner under the Board's
 6 standards." January 11, 2016 Hearing Transcript 507:12-17 (Dkt. Page ID: #50). Even more
 7 surprising was Officer Haddad's sudden mention of requiring Charney's testimony in
 8 addition to documents. January 11, 2016 Hearing Transcript 510:18-19 (Dkt. Page ID: #53).

9 On or around February 4, 2016, the NLRB served Respondent with Notice of
 10 Institution of Proceedings to Enforce Administrative Subpoena *Duces Tecum*. The NLRB
 11 also issued an Application for Order Requiring Compliance with American Apparel's
 12 Administrative Subpoena *Duces Tecum* along with an accompanying Memorandum of
 13 Points and Authorities in support thereof. The Application seeks enforcement of the
 14 subpoena's document requests and testimony of the same. NLRB's Memorandum in
 15 Support of Application at p. 2 (Dkt. Page ID: #71). It further seeks to require Charney to
 16 testify about *anything related to American Apparel*, citing the supposedly-special nature of
 17 the Board's subpoena-enforcement authority as reason to avoid strict compliance with the
 18 requirements of all matters of civil procedure. NLRB's Memorandum in Support of
 19 Application at p. 5 (Dkt. Page ID: #74).

20 Substantively, the Memorandum predicates the Board's authority to enforce the
 21 subpoena on the basis that "the subpoena is not overly broad, and the records or testimony
 22 sought are relevant to the inquiry." NLRB's Memorandum in Support of Application at p.
 23 6 (Dkt. Page ID: #75). The Memorandum further states in a conclusory manner that the
 24 documents and testimony sought are relevant to the Board's ... determination on the
 25 merits of the questions at issues in the hearing. NLRB's Memorandum in Support of
 26 Application at pp. 7-8 (Dkt. Page IDs: #76-7). Despite flaunting the fact that "Respondent
 27 has elected to ignore the subpoena duces tecum" to justify enforcing the subpoena, the
 28 Board conveniently declined to address any of the objections to the subpoena's scope

1 previously raised by Charney. NLRB's Memorandum in Support of Application at p. 8
 2 (Dkt. Page ID: #77). Lastly, the Board neglected to contemplate the enormous infringement
 3 that enforcement of the subpoena as-written would have on Charney's privacy.

4 On February 11, 2016, this Court issued an (in Chambers) order regarding this
 5 Application for Order Requiring Compliance with Administrative Subpoena *Duces Tecum*
 6 Briefing Schedule. In pertinent part, this Court ordered that Charney's opposition be
 7 served and filed within twenty-one (21) days of service. On or about February 16, 2016,
 8 Respondent was served with this order. Therefore, Respondent's Opposition is timely.

9

10 **III. LEGAL ARGUMENT**

11 A district court's scope of inquiry in an agency subpoena enforcement proceeding
 12 first looks: to whether Congress has granted the authority to investigate; to whether
 13 procedural requirements have been followed; and to whether the evidence is relevant and
 14 material to the investigation. NLRB v. North Bay Plumbing, Inc., 102 F.3d 1005, 1007 (9th
 15 Cir. 1996) (citing EEOC v. Children's Hosp. Med. Ctr. of Northern Cal., 719 F.2d 1426,
 16 1428 (9th Cir. 1983) (en banc)). If these conditions are met, then the subpoena may be
 17 enforced unless the responding party can prove that the inquiry is unreasonable because it
 18 is unduly burdensome or overly broad. Id. at 1008. However, a district court's decision to
 19 enforce a subpoena does not preclude that court from limiting the dissemination of
 20 subpoenaed materials by use of a protective order. NLRB v. Cable Car Advertisers, Inc.,
 21 319 F. Supp.2d 991, 999 (N.D. Cal. 2004) (holding that employer's concerns over
 22 proprietary information "may be addressed by requiring production of the documents
 23 subject to a protective order"); NLRB v. SEIU, Local 521, 2008 WL 152176, at 1008. *3
 24 (N.D. Cal. Jan 16, 2008) (holding that "to the extent that there are any confidentiality
 25 concerns attendant to the disclosure of some information called for by the subpoenas, those
 26 concerns may be addressed by production subject to a protective order").

1 **A. The NLRB Has Not Established That It Met The Necessary Procedural**
 2 **Requirements.**

3 1. **The NLRB's regulations do not necessitate physical production**
 4 **of documents and appearance to testify in lieu of other**
 5 **alternatives at the pre-complaint phase.**

6 As conceded by the Board, the subpoena in question is merely an investigative
 7 subpoena – that is, a subpoena necessary for gathering evidence to “[d]eciding whether a
 8 complaint or compliance specification should issue ... or [m]aking appropriate
 9 determinations in processing R cases.” NLRB Casehandling Manual at § 11770. While use
 10 of subpoenas is sometimes necessary in “order to ascertain the facts on which to base an
 11 administrative decision on the merits, ... [i]nvestigative subpoenas, however, are no
 12 substitute for a promptly initiated, dogged, and thorough pursuit of relevant evidence from
 13 cooperative sources. Investigative subpoenas should be utilized responsibly.” NLRB
 14 Casehandling Manual at § 11770.

15 It appears that the NLRB believes it has the right to require witnesses to testify
 16 pursuant to an investigative subpoena, see 29 C.F.R. § 102.31(b) (authorizing the use of
 17 subpoenas *ad testificandum*). The Board contends that Respondent failed to comply with its
 18 subpoena because he “did not appear at the hearing with the requested documents or to
 19 testify.” NLRB’s Application at p. 4 (Dkt. Page ID: #4). This contention overlooks the fact
 20 that issuance of subpoenas *duces tecum* does not *ipso facto* require physical production of
 21 documents or presence at a hearing to testify.

22 In lieu of physical production, “the subpoenaed party may furnish a sworn affidavit
 23 setting forth the desired evidence or an admissible summary of that evidence, provided that
 24 pertinent records are made available to the Board agent to ensure accuracy.” NLRB
 25 Casehandling Manual at § 11776. Given the ostensible purpose of an investigative subpoena
 26 (*i.e.*, to make a determination as to whether a complaint should issue rather than
 27 establishing proof), the possible due process concerns arising from permitting a one-sided
 28 discovery process, in-person appearance (*i.e.*, deposition) can be held later if a complaint

1 does issue.

2 Thus, should an enforcement order issue, Charney requests the order be limited to
 3 compelling production of pertinent records along with a sworn affidavit setting forth the
 4 desired evidence or an admissible summary of that evidence.

5 **2. The Subpoena is constructed improperly for the purpose of
 6 soliciting testimony.**

7 The Board contends that its subpoena *duces tecum* requires Charney to not only
 8 produce documents but also to testify to the Board. This flatly contradicts the Board's
 9 practices governing the issuance of investigative subpoenas.

10
 11 "Regions are authorized to issue investigative subpoenas *duces tecum* for the
 12 production of documents or other materials from any party or witness and
 13 investigative subpoenas *ad testificandum* to compel testimony from witnesses to
 14 secure evidence not conveniently available from other sources when foreseeable
 15 barriers to enforceability are not present." NLRB Case Handling Manual at §
 16 10508.7.

17
 18 Pursuant to the Board's own case handling practices, the proper technique to seek
 19 testimony is via subpoenas *ad testificandum*. Here, the Board issued only a subpoena *duces*
 20 *tecum* to seek the production of documents and other materials. Had it intended to seek
 21 testimony, the Board would have issued a subpoena *ad testificandum* instead - a position
 22 that Officer Haddad agreed with on November 30, 2015.

23 For this reason, should an enforcement order issue, Charney requests that the order
 24 be limited to compelling production of documents without testimony.

25
 26 **3. The Subpoena is constructed improperly due to its lack of
 27 specificity and excessive requests for "all" records.**

28 Each of the eight requests seeks "all" messages, documents, or applications sought
 between Respondent and other parties. Again, the Board's practices governing the issuance

1 of investigative subpoenas provide as follows:

2
3 “A subpoena *duces tecum* should seek relevant evidence and should be drafted as
4 narrowly and specifically as is practicable. The use of the word “all” in the
5 description of records should be avoided wherever possible. For example, the phrase
6 “the corporate records showing total purchases” might be substituted for the phrase
7 “all books, records, documents, and other writings that will show total purchases.”

8 NLRB Case Handling Manual at § 11776.

9
10 This Board improperly constructed this subpoena insofar as its excessive use of the
11 word “all” squarely contradicts the NLRB’s procedures for issuing a subpoena *duces tecum*
12 and the documents sought are not described as narrowly and specifically as possible.

13 The burden lies on the Board, not Charney, to devise an equitable way to limit the
14 requests for emails and communications. The mere fact that the NLRB “cannot
15 contemplate emails or and communication relating to American Apparel that doesn’t
16 somehow indicate whether or not Mr. Charney is improperly involved with the Petitioner
17 under the Board’s standards” in no way indicates that a more narrow or specific request is
18 impossible to craft. The burden lies with the Board to devise a way to narrowly tailor its
19 subpoenas (particularly in a manner consistent with the Board’s own practices). The
20 Board’s lack of ability or desire to do so is not a compelling reason to disregard Charney’s
21 privacy and require him to submit to an enormously burdensome and harassing task.

22 For this reason, should an enforcement order issue, Charney requests that the order
23 be narrowly constructed to protect Charney’s privacy rights and, at minimum, strike each
24 and every instance of the word “all.”

1 **B. The Subpoena Is Overbroad Because It Ignores the Board's Actual**
 2 **Needs.**

3 Relevancy may be established by the Board "so long as the material requested by the
 4 subpoena 'touches a matter under investigation.'" Cable Car Advertisers, Inc., 319 F.
 5 Supp.2d at 998. That said, simply because documents are relevant does not mean that their
 6 production is necessary to satisfy the Board's investigatory mission. Again, an investigative
 7 subpoena serves the specific purpose of gathering evidence to decide "whether a
 8 complaint or compliance specification should issue." NLRB Casehandling Manual at §
 9 11770. Given that the Board has subpoenaed numerous other parties to receive an accurate
 10 and representative sampling of the available documents and has declined the opportunity
 11 for additional production, it is unlikely that the Board will change its inclination regarding
 12 whether a complaint should issue. Indeed, the Board has failed to claim that any additional
 13 information is even necessary for it to make a determination whether to issue a complaint.
 14 Charney respectfully submits that a subpoena that seeks information beyond what is
 15 actually needed is intrinsically overbroad.

16 **C. Even If Enforced, The Court Should Place Reasonable Limitations On**
 17 **The Dissemination Of The Requested Information.**

18 The key issue here is that the NLRB remains completely unconcerned that the
 19 documents it seeks contain sensitive information and confidential details about Charney's
 20 personal life because requesting "all" communications or messages between him and the
 21 parties listed entails revealing conversations held between him and close friends in
 22 confidence with each other. As a third party, it is unduly prejudicial for Charney to be
 23 forced to publicly share these communications. It is similarly unduly prejudicial for
 24 Charney to be forced to publicly discuss and produce any business license applications he
 25 may have filed since January 1, 2015.

26 Assuming, *arguendo*, that Charney did cause applications for business licenses to be
 27 filed on or after January 1, 2015, the Board's subpoena completely disregards the possibility
 28 that requesting these applications would force him to reveal sensitive proprietary

1 information and confidential details about his business affairs – especially when this request
 2 is not narrowly tailored to NLRB activity.

3 While the Board's inflexibility is unfortunate, it can be cured by the Court. Even
 4 when enforcement of a NLRB subpoena is appropriate, district courts address the
 5 confidentiality concerns of subpoenaed parties via the use of protective orders. Cable Car
 6 Advertisers, Inc., 319 F. Supp.2d at 999; SEIU, Local 521, 2008 WL 152176, at *3; see Fed.
 7 Rule Civ. Pro. 26(c)(7); see generally 9 James WM. Moore et al., Moore's Federal Practice
 8 § 45.04[2][b] (3d ed. 2007) (citing Fed. Rule Civ. Pro. 81(a)(5)) ("Though the federal
 9 rules do not alter an agency's subpoena powers, the rules are applicable to actions to
 10 enforce an administrative subpoena"), and § 81.05[3] (citing Donaldson v. U.S., 400 U.S.
 11 517, 528 (1971) ("This rule gives the district court a great deal of discretion to fashion rules
 12 appropriate to the situation")). Thus, Charney respectfully requests that, if the Court
 13 issues an enforcement order, it include a protective element limiting the NLRB from
 14 disclosing the requested information to anyone other than its own staff. This limitation,
 15 which would be subject to future modification as deemed prudent by the Court, would
 16 strike a reasonable balance between the NLRB's investigatory needs and Charney's
 17 confidentiality concerns.

18 As the Charging Party and the Board are well aware, Charney is a party to numerous
 19 lawsuits involving American Apparel, including but not limited to the following:

- 20 • *Charney v. American Apparel and David Danziger*, Los Angeles Superior Court
 21 Case No. BC 585664;
- 22 • *Charney v. American Apparel and Colleen Brown*, Los Angeles Superior Court
 23 Case No. BC 581602;
- 24 • *Charney v. American Apparel, Allan Mayer, David Danziger, Robert Greene,*
 25 *Marvin Igelman, William Mauer, and John Luttrell*, Los Angeles Superior
 26 Court Case No. BC 586119;
- 27 • *Charney v. Standard General, et al.*, Los Angeles Superior Court Case No. BC
 28 586119; and

- *Charney v. American Apparel, Inc.*, American Arbitration Association Case No. 01-14-0000-7628.

By casting a wide net and seeking to obtain testimony from Charney about *anything* related to American Apparel, the Charging Party is effectively on a fishing expedition with the hopes of acquiring advantageous information not otherwise available to them as those matters are currently stayed pending American Apparel's bankruptcy proceedings in the United States Bankruptcy Court - District of Delaware, Case No. 15-12055.

If this Court blindly orders Charney to comply with the subpoena at issue, it will effectively enable the Charging Party to acquire facts learned in this matter and apply them to other cases. Moreover, as the Board has stated directly, the testimony it seeks to compel is not strictly limited to the subpoenaed documents. By offering the Charging Party *carte blanche* opportunity to ask questions about Charney's involvement with American Apparel, this Court risks enabling them to subversively obtain information pertaining to any litigation.

This is obviously an improper use of an NLRB investigative subpoena. For these reasons as well, this Court should deny the Application in its entirety.

IV. CONCLUSION

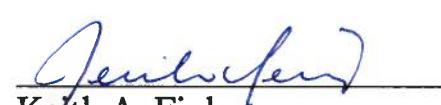
While Charney respects the Board's statutory mandate for the investigation of unfair labor practices and representation matters, this respect does not equate to blind acquiescence. The Board's Application overlooks the distinction between a party's good-faith objections and "contumacious conduct." In this situation, there are legitimate concerns regarding the scope of the Board's authority to compel Charney to testify, the Board's actual need for additional information, and, most importantly, Charney's fundamental desire to protect his personal privacy as a third party and any proprietary information that he may have. Furthermore, the Application improperly seeks to transform what was originally a subpoena for documents into a subpoena for testimony as well and further into a subpoena for testimony that is not limited to the subpoenaed documents.

1 Accordingly, Charney respectfully requests that the Application be denied in its entirety.

2 In the alternative, should an enforcement order issue, Charney respectfully requests
3 that the order be limited to compelling production of pertinent records along with a sworn
4 affidavit setting forth the desired evidence or an admissible summary of that evidence; that
5 the order be limited to compelling production of documents without testimony; that the
6 order be narrowly constructed to protect Charney's privacy rights and, at minimum, strike
7 each and every instance of the word "all"; and/or that the order place reasonable
8 limitations on the dissemination of the requested information, including but not limited to,
9 a protective element limiting the NLRB from disclosing the requested information to
10 anyone other than its own staff, limiting the Charging Party's use of any information
11 obtained via the subpoena to this NLRB matter only, and providing that public electronic
12 access not be provided to any documents that may be produced pursuant to the subpoena.

13
14 DATED: March 8, 2016

KEITH A. FINK & ASSOCIATES

15
16 
17 Keith A. Fink
18 Sarah E. Hernandez
19 Jennifer H. Yeung
20 Attorneys for Respondent
21 Dov Charney

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 11500 W. Olympic Boulevard, Suite 316, Los Angeles, California, 90064.

On March 8, 2016, I served the document described as **OPPOSITION TO APPLICATION FOR ORDER REQUIRING COMPLIANCE WITH AMERICAN APPAREL'S ADMINISTRATIVE SUBPOENA *DUCES TECUM*** on all interested parties in their action as follows:

[X] by placing [] the original [X] true copies thereof enclosed in sealed envelopes addressed as follows:

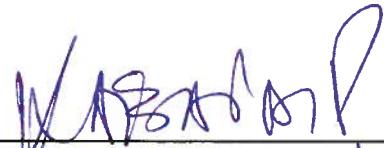
Margaret W. Serrano	Al Latham, Jr.
Stephanie Cahn	Cameron W. Fox
William M. Pate	Paul Hastings LLP
National Labor Relations Board	515 S. Flower St., 25th Floor
Region 21	Los Angeles, CA 90071
888 South Figueroa Street, Ninth Floor	
Los Angeles, California 90017	

[X] BY MAIL

[X] As follows: I am "readily familiar" with the firm's practice for collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[X] (FEDERAL) I declare that I am employed in the office of a member of the bar of the court at whose direction the service was made.

Dated: March 8, 2016


Popaul Kabaidi